

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

OCT 10 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

—
No. 53.
—

LAWRENCE C. KINGSLAND, Commissioner of Patents,
Petitioner,

v.

VERNON M. DORSEY.

—
On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

—
BRIEF OF RESPONDENT.
—

WILLIAM E. LEAHY
WILLIAM J. HUGHES, JR.
JAMES F. REILLY
821 Fifteenth Street, N. W.
Washington 5, D. C.
Attorneys for Appellant.

CONTENTS.

	Page
THE FIRST QUESTION RAISED BY THE PETITION.....	2
THE SECOND QUESTION RAISED BY THE PETITION.....	5
DORSEY DID NOT PARTICIPATE IN THE PREPARATION OF THE CLARKE ARTICLE WITH INTENT TO FILE IT IN THE PATENT OFFICE.....	8
DORSEY'S FILING OF THE CLARKE ARTICLE IN THE PATENT OFFICE WAS INNOCENT.....	13
DORSEY DID NOT MISLEAD THE PATENT OFFICE AS TO THE TEACHINGS OF THE CLARKE ARTICLE.....	16-18
DORSEY DID NOT MISLEAD THE THIRD CIRCUIT COURT OF APPEALS AS TO THE TEACHINGS OF THE CLARKE ARTICLE	16-23
THE PAYMENT OF MONEY TO CLARKE.....	23
THE THIRD QUESTION RAISED BY THE PETITION.....	25
THE EXTENT OF REVIEW.....	26
DORSEY WAS DEPRIVED OF DUE PROCESS OF LAW....	30
BURDEN OF PROOF.....	32
STATUTE OF LIMITATIONS.....	34
DORSEY WAS NOT A PARTY TO ANY CONSPIRACY....	36
THE COURT BELOW WAS JUSTIFIED IN CRITICIZING THESE PROCEEDINGS	37
CONCLUSION	38

TABLE OF CASES.

Adriaans, In re, 28 App. D.C. 515.....	28, 33
Armat Moving Picture Co. v. American Mutascope Co., 118 Fed. 840.....	21
Dillon Pulley Co. v. McEachran, 69 Fed. (2d) 145 (C.C.A. 8th)	21
Doe, In re, 95 Fed. (2d) 386, (C.C.A. (2d)).....	28

	Page
Dorsey v. Ooms, Commissioner of Patents, 69 Fed. Supp. 788	29, 34
Garfield v. Spaulding, 32 App. D.C. 153	26, 30
Hazel-Atlas Co. v. Hartford-Empire Company, 64 S. Ct. 997; 322 U.S. 238	2, 5, 6, 31, 32
May v. United States, U.S.C.A. 175 F. (2d) 994	37
Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed. Co., 295 Fed. 748	21
People ex rel. Colorado Bar Asso. v. Tanquary, 48 Colo., 122; 109 Pac., 260	35
People ex rel. Healy v. Hooper, (1905) 218 Ill. 313, 75 N.E., 896	36
People ex rel. Noyes v. Allison, 68 Ill. 151	35
Robertson v. United States, 285 Fed. 911	27, 28
Smith, Re. (1906), 73 Kan. 743, 85 Pac. 584	36
Thatcher, In re., 190 Fed. 969	33
United States v. Hartford-Empire Co., 46 F. Supp. 541	6
United States ex rel. Wedderburn v. Bliss, 12 App. D.C. 485	26, 27, 30
United States v. Watkins, 73 Fed. Supp., 216	28

IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

No. 53.

LAWRENCE C. KINGSLAND, Commissioner of Patents,
Petitioner,

v.

VERNON M. DORSEY.

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.**

BRIEF OF RESPONDENT.

The basic question for decision by this Court is whether Dorsey, a lawyer of over 50 years honorable practice, is to be disbarred for acts done 23 years ago on the strength of implications derived from the decision of this Court in a case in which he was not a party, for the order of disbarment, is not bottomed in fact on any evidence produced in a proceeding in which Dorsey was a party, but on the de-

cision of this Court in *Hazel Atlas v. Hartford-Empire Company*, 64 S. Ct. 997; 322 U. S. 238.

Note: It is alleged in the Brief for Petitioner that the record here is substantially the same as in the Court's cases. This is not so. The sworn testimony here, exclusive of exhibits, covers over 600 printed pages and includes the deposition of Hatch (130 pages), Carter (60 pages), Dorsey (30 pages), Brown (130 pages) and Clarke (250 pages). Dorsey only appears in the Court cases by a two page affidavit printed here as Exhibit D-72B (Tr. 889) made under the circumstances stated on pages 940-941 of the record and Clarke was not heard at all therein. The record before the Court did not include the Dorsey Exhibit 72C (R. p. 759) being a letter from Hatch to Dorsey dated the 20th of May 1926. Reference will be made to this letter later.

The first question on which a decision is asked by the Petition for Certiorari is—

“Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.”

It is submitted that this question is not here presented. The Court below in no way found a different standard from that declared by this Court. It held that on the record before it the facts as applied to Dorsey were not the facts found by the Court as applied to certain unnamed parties, and that the standard declared by this Court was not to be applied to what Dorsey had done.

In considering whether the lower Court willfully disregarded the expressed views of this Court, as is urged in the brief we must consider the facts found by the lower

Court. That such findings were correct will be shown in discussing the second ground urged for certiorari.

In the Hazel-Atlas case this Court on a record made up entirely of the pleadings and affidavits (322 U. S. at 240), found that (p. 241) certain officials and attorneys (*without giving names*) (1) determined to publish in a Trade Journal an article signed by an ostensible disinterested expert which would describe the "gob feeding" device claimed in the Peiler patent as a remarkable advance in the art; (2) prepared such article; (3) procured the signature of one Clarke thereto; (4) caused the article to be published in the National Glass Budget; (5) filed a copy of such publication in the Patent Office in the file of the Peiler application and (6) persuaded Clarke by the payment of a large sum of money to suppress the truth as to the origin of the article published over his name.

The Court thus found a conspiracy extending from the inception of the idea to the attempt to suppress facts.

The Lower Court whose decision is brought here for review found on the full record made in this case; that Dorsey and Brown, (the latter being the legal representative of the owners of the Peiler application) sometime late in 1925 discussed the desirability of filing in the Peiler case an affidavit by Henry Carter, an officer of a licensee of Hartford; that Carter declined to make such an affidavit as not being qualified; that Dorsey went to Europe in January 1926 and returning in April found on his desk a manuscript of an article prepared by Roswell F. Hatch; that Dorsey made some minor corrections (not exceeding two words) in the manuscript and returned it to Hatch; that there is no suggestion or evidence that up to this time Dorsey had any knowledge of the Hatch article or that Hatch intended it to be filed in the Patent Office and Dorsey testified that at the time of returning the article he had no intention of so doing; that Dorsey later remembered the Clarke article; that Hatch sent another manuscript in a letter to Dorsey dated May 20, 1926 (Exhibit D-72C, Tr. p. 759) stating that

he had shown Clarke a copy of what he had written and that Clarke had agreed "to rewrite the article to a considerable extent I suspect and publish it in the Trade Journal".

The U. S. Court of Appeals for the District of Columbia after finding as above exonerated Dorsey from any misconduct, but it is pressed by the petitioner that such exoneration disregarded the language of this Court in the Hartford case—

"Truth needs no disguise. The article even if true should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators (322 U. S. at 247)"

It is submitted that this is illogical. The Court applied the language last quoted to those who participated in the six acts before listed. Dorsey was not an actor in any of them as stated. He did not plan or aid in the planning of the Clarke article to influence the Patent Office; he was not acquainted with any improper pressure on Clarke to father the article; he did not know that the Clarke article was the same as that prepared by Hatch and he was not a party or in any way participated in the payment of any money to Clarke. His conduct must therefore be judged by a different standard than the conduct of those who were active participants. Dorsey was a proverbial "bystander" and perhaps the tool of others.

This Court used the language quoted as applicable to those guilty of the several conspiratorial acts found to have been planned and carried out. The Court of Appeals was weighing the guilt of Dorsey, the only one before it and who it had found was not a party to the general plan and who innocently participated in one of the acts only. Undoubtedly the Court below would have followed the intimation in the decision of this Court if it found that Dorsey had filed the Clarke article with full knowledge of its history whether he did or did not know the statements therein were

true. He did not know the history and the statements made were true, for Dorsey had obtained a thorough knowledge of glass practice beginning in 1898 as Patent Counsel for the Corning Glass Works, and had from 1912 been in the thick of the feeder fights (Tr. 147).

The second question on which a decision is asked by the Petition for Certiorari is—

“Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that respondent had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the *Hazel-Atlas* case.”

In 1926 there was pending in the Patent Office the application of one Peiler (the file wrapper of which is Ex. E) owned by the Hartford Empire Company (hereinafter called “Hartford”) of Hartford, Connecticut.

Robson D. Brown was a resident of Hartford, Connecticut and had charge of the Patent Department of the Hartford-Empire Company.

Roswell F. Hatch was employed in Hartford by the Hartford Company as a contact man between the engineers and the Patent Department.

Henry W. Carter of Toledo, Ohio, was an officer of the Owens Bottle Company, which was a licensee of the Hartford-Empire Company.

Dorsey was located in Washington and was the associate attorney in the Peiler application. In 1926 he was 57 years of age and had practiced before the Patent Office for thirty-six (36) years. No charge of misconduct had ever been made against him up to the date of the trial (R. 69). He had had much experience in glass matters. After 1928 Dorsey ceased any close connection with Hartford and was only called in when his experience might be of any value. (R. 163).

Neither Carter nor Hatch was an attorney in the Peiler application. While Brown was not an attorney on the record in the Peiler case, he, as the understudy of W. H. Honiss, the principal attorney, and by virtue of his position as head of the Patent Department of Hartford, was in control of the prosecution of the case.

The proceedings were initiated by a "Show Cause Order" against him dated October 11, 1944 why he should not be disbarred from practice before the Patent Office (R. 9). At the same time identical charges were preferred against Robson D. Brown, Henry W. Carter and Roswell F. Hatch (Tr. 2); the specific charge in each citation being that each respondent had for the purpose of obtaining the allowance of the Peiler application participated in the preparation of an article published in the Glass Worker, a trade publication, over the signature of William P. Clarke and filed such article in the Patent Office "knowing that such article was not by the said Clarke".

The Commissioner appointed a Committee consisting of seven of his subordinates to hear the evidence and to submit recommendations and appointed a prosecutor.

The cases for the four respondents were consolidated for taking testimony (R. 61). As a result the record contains much not germane in any way to Dorsey, and much not binding on Dorsey and therefore Dorsey reserved the right of objection until such time as he should be notified that the testimony bore on him. He was promised such notice (Tr. 37), but never received it until the decision of the Committee finding him guilty.

The Committee received in evidence over the protest of all respondents, extracts from the finding of the District Court for the Northern District of Ohio in the Anti-trust case in *United States v. Hartford-Empire Co.*, 46 F. Supp. 541; the decision of the Circuit Court of Appeals of the Third Circuit in *Hazel Atlas v. Hartford-Empire Co.*, (137 F. (2d) 64) and the decision of this Court in the appeal therefrom, although in none of these was Dorsey a party.

The counsel for the Commissioner urged on the Commissioner's Committee that the decisions placed a burden on respondents to show cause why they should not be disbarred (Tr. 16).

Note: "It had been judicially established that a fraud was committed. The decisions make out a *prima facie* case that respondents perpetrated the fraud". (Brief for the Department of Commerce, Page 4).

The Committee while not adopting in terms this contention did so in effect. In their decision, after many references and full quotations from the Court's decisions they found Dorsey and the others guilty not only of the charge in the specification, but of numerous other acts without pointing where in the record made before them there was found proof of such guilt.

Five of the Committee recommended to the Commissioner that disbarment orders be issued against Dorsey and two recommended a suspension for a limited period. All recommended the disbarment of the three other respondents.

Thus, they heard testimony and adjudicated guilt

(a) as to Dorsey's participation in the preparation of an article, knowing it to be used for filing in the Patent Office;

(b) as to Dorsey's filing the article in the Patent Office without notifying the Office as to its origin;

(c) alleged improper reasoning in a brief filed by Dorsey in the Patent Office;

(d) alleged improper reasoning in a brief filed before the Court of Appeals of the 3d Circuit after the Peiler patent had issued;

(e) payment of money to Clarke in 1932, six years after the article was filed in the Patent Office.

At no time during the taking of the testimony or prior to the report of the Committee was Dorsey informed in any way that any misrepresentation of the contents of the Clarke article, or the payment of money to Clarke would be considered in determining his guilt of what he was charged with.

The Committee treated all of these matters *in extenso* and apparently based their recommendation of disbarment on Dorsey's participation in each of them, although they did not take the trouble in their report to specify where they found in the record any proof of Dorsey's participation in some of them.

The brief for the petitioner here seeks to support each of these charges by constant references to testimony not germane to Dorsey or relevant against him and by incomplete quotations. Some of these we will specifically refer to later, but the great length of the petitioner's brief will prevent us from noting each of them.

The District Court intent perhaps on the overall picture as affecting Carter and Hatch also neglected to consider Dorsey's position separately and in detail. The only discussion as to the testimony against Dorsey in Judge Morris' decision is found on pages 22, 24, 26 and 30 of the Record.

Dorsey's participation in each of the five items named above will be discussed separately and in detail.

AS TO THE ALLEGED PARTICIPATION BY DORSEY IN THE PREPARATION OF AN ARTICLE WITH THE INTENT TO FILE IT IN THE PATENT OFFICE TO INFLUENCE THE ACTION OF THE OFFICE IN THE PEILER CASE.

(For Committee's discussion, see Record p. 42; for that of Judge Morris, see *idem*, p. 19.)

We have added the emphasized words in the above heading because it is quite obvious that Dorsey could properly, without odium of any kind, participate in the preparation of any technical article for general public consumption. With this preamble we will discuss the proofs as to Dorsey's participation in the preparation of the article.

The facts as to Dorsey's alleged participation in preparing or helping to prepare the article are fully and correctly stated in the opinion of the Court below.

The testimony supporting this is as follows:

Dorsey testified (R. 162).

"4. Deponent went abroad in January, 1926; that upon his return at the end of March or early in April he found on his desk a letter from Mr. Roswell F. Hatch, of Hartford, employed by the Hartford-Empire Company, stating that he (Hatch) had gathered data and had prepared an article, a draft of which he enclosed, and which Hatch stated he would submit to Mr. Maloney, who Hatch stated was president of the Bottle Blowers, with a view of getting Maloney to revise it, and after revision, to publish it.

"5. That Hatch in said letter requested deponent's criticism of the draft, but since the article so submitted by Hatch was not of the same nature as the article which had been desired from Mr. Carter, it had little interest to deponent, who, in the press of work awaiting his attention after two months abroad, only hurriedly read it over and returned it to Hatch, with two or three verbal corrections;"

Dorsey could not when testifying in this case produce the letter returning the manuscript to Hatch in April, but in the suit brought by the United States against the Hartford-Empire Company noted on page 26 of the petitioner's brief the Government took pretrial depositions in the Fall of 1946 and called for the production by Hartford of a letter

from Dorsey returning the manuscript. This was produced by Hartford and is shown on the opposite page.

Dorsey, who was called by the Government as a witness, recognized the letter and testified that the words "File 1000" found at the top thereof indicated that he had not written the letter in connection with the Peiler case, but in connection with the general business of Hartford. He also produced his ledger sheet for file 1000 H. E. Co.-General Matters" showing a charge of \$10.00 on the day the letter was written and testified that the file number of the Peiler Case was 1267 and that no charge is entered on that account for the day in question.

To controvert this testimony the petitioner relies on the testimony of Hatch in the Anti-Trust case (in which Dorsey was not a party) to the effect that he consulted Dorsey about the article, but on cross examination in this case he modifies this to the extent that he said he had some correspondence with Dorsey and "without doubt I did mention it to him verbally but I don't remember it particularly" (R. 125).

Again in an attempt to connect Dorsey with the preparation of the Clarke article a quotation is made from Exhibit C-70-7 a letter written by Carter to the President of his company. Carter testified that what was stated in that letter was based on his own ideas and not what Hatch told him (Tr. 618). Moreover, he testified that he never showed the letter to Dorsey and never talked with Dorsey about the article (R. 129). It is incompetent as proof of anything against Dorsey.

The petitioner recognizes this, attempts to show its relevancy by urging a conspiracy as to which there is no proof. This attempt is discussed by the Court below. (R. 82)

Certainly the established facts up to this time carry no proof or intimation of Dorsey's participation in a conspiracy to impose on the Patent Office. Appreciating this the petitioner in keeping with its policy to argue the case by suggestion and innuendo on page 36 suggests the conspir-

DORSEY & COLE
COUNSELLORS AT LAW

VERNON A. DORSEY, Washington, D. C.
ALAN F. COLE, New York, N. Y.

DORSEY F. FARMAN
ALAN F. COLE
VERNON A. DORSEY

NEW YORK OFFICE, 100 Broadway

600 F STREET, N. W.
WASHINGTON, D. C.

R

IN ANSWERING PLEASE REFER TO
FILE NO. 1000

PATENTS AND PATENT CASES IN
THE FEDERAL COURTS, U.S. PATENT
OFFICE AND FOREIGN COUNTRIES

April 19, 1926

Mr. R. F. Hatch,
c/o Hartford-Empire Company,
P. O. Box 2121,
Hartford, Conn.

Dear Hatch:

I am returning herewith the essay you have prepared for Mr. Maloney. I have indicated one or two changes in language which I think might be advisable, and I beg you to pardon my temerity in putting them on your copy.

I wish you would send me a print of the production chart which is attached to the last page.

Yours truly,

VMD/EM

Enc.

W. F. Maloney

acy had its inception in the suggestion that the original plan was that Carter should make the affidavit, coupled with the assertion in the brief that the relations between Owens and Hartford were a deep and dark secret in 1926. There was no proof that the relations between Hartford and Owens were not generally known in 1926. They were known to the trade and the Patent Office. Carter's connection with Owens was also known and hence any article or affidavit by Carter, if true, could in no way impose on the Patent Office.

Again to prove Dorsey's intent to use the Hatch article in the Patent Office at the time he made the corrections and returned the manuscript to Hatch in April, the petitioner's brief refers to testimony not connected with this manuscript or time, but relating to subsequent dates.

Hatch at the time he sent the manuscript to Dorsey in April was as shown by the record in touch with Carter in making alterations and changes in his original drafts. See Exhibit C-70-3, 4 and 5 (R. 745, 754 and 756). There is nothing to connect Dorsey with this correspondence or to show Dorsey's knowledge of it.

As far as Dorsey is concerned his next connection with the article was when in preparing to amend the Peiler case in May, 1926 he remembered the graph attached to the Clarke article and wired Hatch for a copy. Dorsey testified: (R. 140).

Q. You wired for a copy of the draft? A. All right, because I had returned to Mr. Hatch the draft I had received in March. It went back to him. I didn't have anything. I was getting ready to amend the Peiler case, and I wanted to know what good I could gather out of the facts stated in that article.

Hatch on receipt of this wrote Dorsey the letter of May 20, 1926 (Exhibit D-72-C) (Tr. 759). We call attention to two points in this letter.

(1) Hatch sends Dorsey "one of the *original* drafts" which before it appears in print "will probably be changed considerably from the present form".

(2) Hatch tells Dorsey that Clarke said he would re-write the article to a considerable extent.

Dorsey does not remember seeing the copy that Hatch stated he was enclosing, but as Hatch stated he was sending it, presumes he, Dorsey, received it. (R. 666).

Nothing connects Dorsey further with the Clarke article in any way until after it was actually printed and a copy of it ordered for filing in the Patent Office with Dorsey's letter stating it to be by Clarke.

The attempt to establish that Dorsey from the beginning intended to use the article resulting from the Hatch manuscript is entirely unsupported. Stress is laid by petitioner on Dorsey's testimony that in April he found *facts* in the manuscript sent in which he wanted to submit to the Patent Office (R. 135). Certainly no blame can be attached to presenting facts, however obtained. Likewise there are many ways of presenting facts, such as by affidavit, which have never been criticized. Again it is quite evident that an attorney of Dorsey's standing would not decide to file an article or affidavit of any kind until he knew definitely and finally what was going into it. The manner of filing is, of course, another matter decision on which could wait until the last minute. Thus as stated by Dorsey he had reached no decision as to the use of or how to use the manuscript or anything growing out of it until it had crystallized. This took place on the publication of the article. (R. 122).

The petitioner calls attention to the dissent of Judge Edgerton. The only support the learned Judge finds for this is the affidavit of Dorsey executed in 1941, under circumstances explained by Dorsey on page 163 of the Record. This affidavit contains nothing contradictory to what is here urged. It is only not as full.

The Committee's Finding as to the Filing of the Clarke Article in the Patent Office with the Representation that Clarke Was the Author Thereof for the Purpose of Influencing the Action of the Office on the Peiler Application.

Dorsey admits that in signing the letter of October 11, 1926, which had been prepared by Brown (R. 119), calling the attention of the Examiner to the Clarke article as published (Ex. E, p. 263) he did it with the intent that if the Examiner believed the statements therein to be true (as Dorsey knew them to be) it would influence him in allowing certain claims to Peiler, but submits that in so doing he was not committing any act of malfeasance.

The Court of Appeals discusses the filing of the article on page 79 of the record and holds Dorsey not guilty of any bad faith therein and further holds that this particular charge is not covered by the specification.

Dorsey's testimony that he filed the printed article as by Clarke in ignorance of its identity with the Hatch manuscript he saw, read and returned on April 19, has been violently attacked as unsupported and improbable.

We answer that after nearly twenty years it is difficult to collect testimony, and that Dorsey's story is inherently probable.

(1) He read the many pages of the manuscript received in April in one hour. This certainly was not such close study as to impress the text on his mind.

(2) He may have well thrown aside the copy of the original draft sent him by Hatch in May without reading it. A busy man would certainly not waste his time on something which had been discarded as erroneous and which was to be rewritten or extensively revised.

(3) Dorsey never saw a copy of the manuscript Hatch showed to Clarke. Hatch's letter of May 20 (R. 259) establishes this.

It is utterly unreasonable to expect that Dorsey in July or August could recognize such similarity as may have existed between the manuscript read by him in an hour and the Clarke article.

As stated by Dorsey (R. 136)—

Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article? A. Oh, it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know.

Q. You made no effort to find out how closely— A. No, I didn't think it necessary. I couldn't see any reason for going in and finding out, and digging into a perfectly open thing, when the man had published it under his own name.

Q. Didn't you know that the article that was published in the name of William P. Clarke as author was, in fact, prepared by Hatch at the time you filed it in the Patent Office? A. I didn't know that the article that was published by William P. Clarke was identically the same or, in substance, as the manuscript I had received from Hatch. On the contrary, Exhibit C, this letter from Hatch gave me fair notice that the article might be materially changed. There was no reason for my going in and chasing it up. I wouldn't have minded putting it in under affidavit if I had gotten it the other way.

As before stated there is nothing in the record proving or suggesting that Dorsey, when he in April returned to Hatch the manuscript sent him by Hatch, knew that the article had been prepared for filing it in the Patent Office or that he contemplated such filing. Nor is there anything in the record proving that Dorsey recognized this Clarke article as printed as the same as the one written by Hatch or knew that Hatch used any improper influence in securing Clarke's acceptance of a Hatch manuscript as his own. Indeed if Dorsey had known of any close connection between Clarke and Hatch he would have set forth the facts stated in the

Clarke article in an affidavit, and filed in the Patent Office instead of the article, for as stated by Dorsey, such affidavit would have carried more probative value than the article itself. To assume that Dorsey, an experienced lawyer, would voluntarily open himself to criticism when a safe and more effective way was open to him is disregarding common sense. Dorsey knew no more than that Hatch had shown an historical manuscript to Clarke and that Clarke had agreed to take it, revise it or rewrite it in whole or in part. Perhaps knowing that Hatch had prepared a manuscript on feeder development and had shown it to Clarke, Dorsey was careless in not demanding proof that the article was composed in the whole by Clarke, but it must be noted that Dorsey had favorably known Brown, Hatch's associate in Hartford for many years and that Hatch had assured Dorsey in the letter of May 20, 1926 that Clarke would take the manuscript and would only publish it after having revised it to suit himself and perhaps rewrite it.

Under these circumstances it is difficult to see how Dorsey was guilty of gross misconduct in designating the Glass Works publication as by Clarke. As above pointed out there was no apparent advantage in filing it as by Clarke instead of incorporating it in an affidavit sworn to by Clarke.

As was held in the matter of Houghton, 67 Cal. 511 8P, 52

"Where it is not clear that the attorney intended to state a falsehood and so to deceive the Court, there is no ground for disbarment."

In addition to the above the Petitioner attempts to show that Dorsey represented to the Patent Office in filing the Clarke article that Clarke was adverse or hostile and does this by mutilated quotations. On pages 5 and 21 of the petition and on pages 5, 15, 36 and 38 of the brief, stress is laid on "reluctant witnesses" occurring in the brief filed by Dorsey before the Board of Appeals and by mutilated quotations it is made to appear that this term applied to Clarke. (On pages 5 the attempt is more pronounced in referring to

a reluctant witness). This mutilation is not inadvertence. We quote as follows from page 4 of respondent's reply brief before the Court below—

"On page 24 the Government's brief, by way of a mutilated quotation, attempts to damn Dorsey with a matter which was exploded at the hearing before the Patent Office. The omitted matter, which immediately follows the quoted matter, is 'Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended charge feeders which he terms 'gob feeders' and stresses the great displacement of manual workers occasioned thereby. Heintzelman, an experienced manufacturer of thirty-five years experience (see Appendix, pp. 69 and 73), states that there have been revolutions in glass feeding art in these years.' This matter was put up to respondent Brown who pointed out that the reluctant witnesses had reference to the presidents of the labor unions and did not include either Clarke or Heintzelman because Heintzelman, in his own affidavit, showed that he was an officer in the Hartford Company. Dorsey's testimony is that Brown's statement is correct (Rec. 672)."

It will be remembered that Clarke's article is based on the reports of the Union officers and it is these reports as given in the Clarke article that give weight to the article.

The Finding that Dorsey Mislead, or Attempted to Mislead the Patent Office as to the Import of or the Conclusion to be Drawn from the Clarke Article.

The Finding of the Committee that Dorsey Mislead or Attempted to Mislead the Third Circuit Court of Appeals as to the Conclusions to be Drawn from the Clarke Article.

As stated in the decision of the lower Court (R. 87) the Petitioner for Certiorari abandoned these at the hearing before that Court, for as there stated:

"The next two charges on which appellant was convicted are identical except as to the tribunal. One is that Dorsey misled or attempted to mislead the Patent Office as to the inferences and conclusions to be drawn from the Clarke article. The next is identical except that in that it is charged that Dorsey misled or attempted to mislead the Third Circuit Court of Appeals as to the import of the Clarke article.

"The latter was too much for the stomach of appellee's special counsel and he tacitly abandons it in his brief (appellee's brief p. 32). Yet appellant was tried and convicted upon this charge and so far as anything in the record shows this count may have been the moving consideration in administering the extreme penalty of disbarment. So far as we have been able to learn this count is a case of first instance in the judicial annals of this country. So far as we have been able to find never before in the history of the country has a subordinate committee of a mere bureau of the government had the arrogance to assume to set itself up as the protector of the dignity and intelligence of a United States Court of Appeals.

"It seems not untimely to remark that if counsel were to be disbarred if they made an inference or drew a conclusion as to the import of any evidence which happened to be at variance with the view of the same evidence held by opposing counsel or by the court, the bar of every tribunal in the country from the Supreme Court down to the Patent Office would soon be decimated.

"The trial court did not find that Dorsey was guilty of misrepresenting the contents of the Clarke article and in our opinion erred when it did not reverse the Commissioner for finding Dorsey guilty on this count.

The Petitioner has retracted his position before the lower Court and has urged that the Board was justified in disbarring Dorsey on this ground. We therefore present the following which was in our brief before the lower Court.

Dorsey did not mislead, nor attempt to mislead, the Patent Office as to the import of or the Conclusion to be drawn from the Clarke article.

The Committee's finding on this is found on pages 70 and 74 of the Joint Appendix and those of Judge Morris on page 33 of the Record.

The charge that Dorsey participated in the production of the Clarke article with the intent to use it in the Patent Office and the charge that he misled the Office as to the teachings of the article are, as a practical matter, inconsistent. Dorsey, a lawyer and an attorney of long standing, would not have prepared an article of which, before it became effective, he would have to distort the meaning. He would have so drafted it that it clearly and emphatically taught his thesis of patentability. The Committee found that Dorsey had misrepresented the import of the Clarke article. Judge Morris seems to have found no misrepresentation but attaches blame to the use of the article to influence the Patent Office even though the argument was made in good faith.

The Committee, however, made it the foundation of their conviction of Dorsey. In their report (Joint App. 83) observe the conclusion that "the matter before us, would have had a radically different aspect if when the Clarke article was filed in the Patent Office it had not been misrepresented as relating only to the commercial success of the specific invention described in the Peiler pending application", etc.

It is difficult to determine exactly how Judge Morris looked at this matter. He acknowledges that the affidavit of Peiler before the Board showed that numerous gob feeders had been in production beside those of Peiler and then sums up the basis of his finding of guilt as follows: (Joint App. 46)—

"It must be remembered, however, that Peiler claimed to be responsible for the invention of the features which made the other machines commercially

successful, and indeed stated that several competitors were paying royalties to the assignee of his patent. It does not follow that, because such an argument could be made in good faith, it was legitimate to support such argument by presenting an article in the preparation of which each of the three petitioners had, to some extent at least, participated, without disclosing such participation and that its publication had been procured by the assignee of the Peiler application."

Here guilt is predicated on

(a) Ascribing to Peiler the commercial merits due to his competitors devices.

(b) Making an argument in good faith based on an article, the content of which were true, but in the preparation of which respondent had participated.

The second ground is included in the charge that the filing of the article as Clarke's (or as the learned Judge indicates without informing the Office that Clarke had been requested to write the article by Hartford) was malfeasance. This has been discussed in the preceding section of the brief.

The Judge in ascribing, if he so does, wrong doing to giving credit to Peiler has misunderstood the situation and the law applicable thereto.

If this Court is willing to accept Judge Morris's finding that no misrepresentation of the teaching of the Clarke article was made, what follows under this heading may be disregarded. If not, we will ask it to continue its reading.

The Peiler application had in it claims broadly directed to shaping charges while hanging in suspension beneath an orifice of a furnace and after such shaping cutting them off to drop into the molds.

The claims stood rejected on a number of patents which did not show what Peiler was claiming but did show stream flow devices, etc., and the Examiner had urged that the idea of suspended charge shaping did not involve patentable invention thereover. The Clarke article showed that stream

feeders had been put out of use by the Owens suction feed which in turn was being superseded by suspended charge or gob feeders, naming as example of such feeders those of Hartford-Fairmont Company, George E. Howard, Tucker & Reeves, Wm. J. Miller, and others (Exhibit E, p. 304).

As above stated, the Committee found malfeasance in Dorsey's part in representing that the article referred to no successful gob feeders but those of Peiler. In holding this the Committee entirely overlooked and disregarded the Peiler affidavit (Ex. E, pp. 266 et seq.) filed with the Clarke article, which not only described and illustrated the specific embodiments of the several types of suspended charge feeders put out by his company but also of the types of feeders put out by Howard, by Miller, by Tucker & Reeves, all named in the Clarke article, with the amount of ware produced on each (Ex. E, pp. 275-278).

When it was called to Judge Morris's attention that the Committee in so holding had overlooked the Peiler affidavit showing that the named feeders were put out by competitors of Hartford and not by Hartford itself, Judge Morris supported the result reached by the Committee in the following language (R. 33):

"It is argued that the Patent Office could not have been lead to believe that the commercial success shown in the Clarke article related only to the Peiler invention because it was shown in the Peiler affidavit that numerous other gob feeders were in production. It must be remembered, however, that Peiler claimed to be responsible for the invention of the features which made the other machines commercially successful and indeed stated that several competitors were paying royalties to the assignee of the patent."

It is submitted that this view of the matter disregards established law and that the extensive sale by others than Peiler's assignee, and without the consent of such assignee, feeders embodying the claims in controversy is as much, or even more, proof of patentability of the claims (and this

was all the Board or the Court was called upon to pass on) than if the feeders in question had been put out by Peiler or his assignee. As was said in *Dillon Pulley Co. v. McEachran*, 69 Fed. (2d) 145, 146 (C. C. A. 8th)—

“A presumption of validity may arise equally from the commercial success of an infringer as from the commercial success of the patentee or his assigns.”

See also *Armat Moving Picture Co. v. American Mutoscope Co.*, 118 Fed. 840-849; *Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co.*, 295 Fed. 748-754.

If such claims express patentable invention over the prior art they were patentable to Peiler because all questions of priority between him and the other workers at the same line had been settled by inferences decided in Peiler's favor.

As Dorsey testified (R. 143):

“Q. Did you regard the statements therein referring to gob feeding as referring to gob feeding by the apparatus and methods described in the Peiler application?”

“A. I regarded it, yes, in one way, in that it referred to our apparatus, but that we were claiming so broadly that all this gob feeding—all these gob feeding devices mentioned there would fall within the claims. I can't give you a direct yes or no answer to that, because I have to qualify it that way. I regarded it as a general discussion of gob feeding, and I also knew that our claims were so broad that they would probably overlap and cover all these gob feeders mentioned.

“Q. Did you mean to argue to the Patent Office that the Clarke article justified the argument that the Peiler invention of that application had revolutionized the art?”

“A. I intended to use it, and I did use it to show that gob feeding was a very great advance in the art. Now, who was entitled to the broad claims on gob feeding is not discussed in that article. That was what was before the Board.

“Q. Didn't you use that article as indicating the revolutionary advance that had been made by Peiler?”

"A. I think the revolutionary advance was made by gob feeding, yes, and we were the only applicant before the Patent Office with these claims, and I presume it necessarily followed that that innuendo was that it was made by Peiler. We had gone through a good many inferences leading up to that conclusion."

• • • • •
 "Q. Didn't you mean to argue thereby that Clarke there was testifying to the advance made by the Peiler invention?"

"A. Clarke was testifying to the advantage of gob feeders and as our claims covered gob feeders, there was certainly an advance made by this invention. I think that was the line. There is nothing in the Clarke article that would indicate Peiler was the broad inventor."

"Q. No, but you argued that article to the Patent Office to establish primary inventorship of Peiler?"

"A. No, but as to the advantages of gob feeding, and we based prior inventorship of Peiler on his own dates, and the fact there was no other contestant for that honor. I didn't argue he mentioned Peiler at all. He didn't."

It is submitted that there was no misrepresentation as to the teaching of the Clarke article and that any criticism as to the Clarke article must be based entirely on the fact that it was filed by Dorsey. When so considered, the argument based on it is not an additional offense of Dorsey but only is brought into this case as a bolstering-up device.

In any case Judge Morris was wrong in not reversing the Commissioner because the Committee found misrepresentation of the contents of the Clarke Article to be of the essence of Dorsey's malfeasance.

Dorsey did not mislead, nor attempt to mislead, the 3rd Circuit Court of Appeals as to the import to be drawn from the Clarke article.

The charge here is identical with the one last considered except for the *forum*. If Dorsey is excusable for his argu-

ment before the Patent Office on the Clarke article, he is likewise excusable for the same argument made before the Court of Appeals. He testifies that he knew no more in 1932 as to the origin of the Clarke article than he did in 1926 (R. 936). Indeed it is a fair inference that in the haste and work of preparing a brief of ninety-eight pages, in which the reference to the Clarke article amounting to one paragraph (for this see R. 383) was inserted by another, he entirely forgot what little he knew in 1926 about its origin. There was nothing added to his knowledge as to the history of the article in the interval. He testified (R. 142):

"I knew no more in 1932 as to the preparation of the Hatch article than I did in 1926. I didn't know as much because it was such a normal thing, filing it in the Office, that anything connected with it had passed out of my mind completely."

It is significant that the Court of Appeals of the 3d Circuit knowing as much or more about the history of the Clarke article as did Dorsey at the time, refused in the Shawkee case in 1934 to modify in any way the holdings in the prior Hazel-Atlas case. (Tr. 392-395 and 667, 668.)

The Findings of the Committee as to the Payment of Money to Clarke in 1932.

(For Committee's report see Record pages 54 et seq.; for Judge Morris's views see Record pp. 28 et seq.).

The Committee evidently placed great weight in reaching their conclusion as to guilt and as to proper punishment on this event. In their report (R. 54) we find the following:

"Nearly six years elapsed after the article was filed in the Patent Office before other events, relevant to the conduct of these *respondents* with respect to it, occurred. These subsequent events cast their light backwardly on the activities of the *parties* during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time." (Italics supplied)

This means that the conduct of all respondents (thus including Dorsey) is to be judged by the payment. This is acknowledged in the answer of the Commissioner to Dorsey's petition to the District Court (R. 17):

"He (Commissioner) states that the petitioner was or should have been aware that the payment of money to Clarke for his part in the publication of the article might be considered in connection with the disbursement proceedings against the petitioner."

More than half of the record before the Board was devoted to it and yet in that half there is not a mention of Dorsey nor a scintilla of proof connecting him with it. This was specifically held by Judge Morris who in his opinion said (R. 30):

"There is nothing in the evidence that connects Dorsey with the payment of any money to Clarke."

This charge has such influence in this case that we quote in full the findings of the Court of Appeals thereon. (R. 82)

"We come now to the last charge, the charge involving the payment of \$8,000.00 to Clarke by Hartford some six years after the publication of the article. The committee and the Commissioner seem to have put great emphasis upon this transaction in arriving at the punishment of disbarment. But neither the committee nor the Commissioner nor any one else can find in the record one scintilla of evidence connecting Dorsey in any way directly or indirectly with the payment to Clarke or with having the slightest knowledge or intimation of it until it was brought out in open court in Toledo in 1941. While the committee's findings lay great stress upon this point in arriving at the maximum penalty, appellee in his brief attempts to limp away from it. He says (p. 321): 'There is no evidence in the record that Dorsey participated in the arrangement for those payments or even knew of them at the time they were made. Consequently, we have never made any point against Dorsey because of the payments *per se*.' Then appellee somewhat lamely tries to

side out of this admission by the somewhat boastful assertion that if it had been necessary he could have tied Dorsey into this transaction '*through the conspiracy rule.*' Appellee's eminent special counsel apparently overlooked the admitted fact that no conspiracy was alleged and that appellant and no one else was tried on that charge. The amount of attention paid to this finding by the committee and the Commissioner, with which Dorsey was not even remotely connected, indicate that the whole finding should be reversed outright."

The third question raised by the Petition for Certiorari is—

"Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office."

It is submitted that the District Court of Appeals had jurisdiction for two reasons, first, absence of due process of law and second lack of substantial proof to convict Dorsey. These are separate sources and arise independently of each other for the statute authorizing disbarment by the Commissioner for "gross misconduct" subject to review by the Court does not give the latter jurisdiction in cases involving absence of due process, that existing independently and prior to the Statute.

The Congress has always recognized that the right of an attorney to practice before the Patent Office is of value and that he should not be arbitrarily deprived of that privilege without a review by a higher authority than the Commissioner of Patents.

The Extent of Review.

Section 8 of the Patent Act of 1861 (16 Statute at Large, Chapter 230) provided in part

"That the Commissioner * * * for gross misconduct may refuse to recognize any person as a patent

agent either generally or in a particular case but the reason of the Commissioner for such refusal shall be duly recorded and be subject to the approval of the President of the United States."

By Section 17 of the Patent Act of 1870 this was amended by substituting the approval of the Secretary of the Interior for the approval of the President and this was re-enacted in the Act of 1874.

The Court of Appeals, District of Columbia has held that, under the Act of 1874, the reviewing and approving power was solely in the Secretary of the Interior and that its jurisdiction was only to consider whether due process of law was observed in the Office and in the Department, specifically holding that the decisions reached in the Department were not subject to review by any other tribunal for any supposed errors (*Wedderburn v. Bliss*, 12 App. D. C. 485).

In *Garfield v. Spaulding*, 32 App. D. C. 153, the Court of Appeals, District of Columbia held that the Court had power to set aside a disbarment order when there was a denial of due process of law.

In *Wedderburn v. Bliss*, *supra*, the Secretary had affirmed the decision of the Commissioner issued after hearing before the Commissioner without he, himself, having heard argument on behalf of Wedderburn. Wedderburn applied for a mandamus to compel the Secretary to grant him a hearing before affirming the order of the Commissioner. In affirming the order of the District Court denying mandam, the Court of Appeals, District of Columbia said (p. 492):

"The question in this case is, whether appellant had in the Department of the Interior the hearing upon his case to which he was by law entitled. For, as to the character of the judgment to be rendered upon such hearing there is of course, no pretense that it can be controlled or directed in any manner by the

courts of law, or that it is subject to review by any other tribunal for any supposed error. In the final determination upon such hearing is for the Secretary of the Interior and not a matter for the consideration of the courts." (Italics supplied.)

The Statute of 1874 again came before the Court of Appeals, District of Columbia in *Robertson v. United States*, 285 Fed. 911. In that case the Court said (p. 914):

"The review and approval of the Secretary of Interior, designed as they are to correct errors or mistakes affecting the right of patent attorneys takes the place of the usual judicial safeguards provided for established courts and, completing as they do the whole proceeding, must be regarded as judicial acts."

This was the situation of legislation and adjudication when in 1922 Congress amended the provisions for approval by the Secretary and provided that the action of the Commissioner may be reviewed by the District Court. The legislative history of the act indicates the Bar Association supported review by the Court. (H. R. 174, 67th Congress, 1st Session, Serial No. 7920, Vol. 1.)

We therefore submit that the Congress in substituting review by the Court as it did in the Act of 1922 for the approval by the Secretary of the Interior as in the previous Act meant that "review" that the Court of Appeals was referring to in *Wedderburn v. Bliss*, supra, and which the lower Court has by virtue of the use of the same word "review" in Title 18, Sec. 26 of the D. C. Code of 1901, over the acts of the District Court and vested in the Courts of the District the same right of review and approval that had been previously vested in the Secretary of the Interior so that this Court has double jurisdiction; namely, that arising from being the guardian of due process of law and that of a general reviewing authority.

Under this contention no greater dignity or finality can be given to the order of the Commissioner here complained of than would be given to the order of a District Court dis-

barring an attorney. This Court in its appellate capacity has the right and duty to consider the sufficiency of evidence to support a charge of disbarment and to justify the punishment inflicted. (*In re Adriaans*, 28 App. D. C. 515; *in re Doe*, 95 Fed. (2d) 386, C. C. A. (2d).)

If this Court should determine that the action of the Commissioner of Patents was an administrative one rather than a judicial act contrary to the ruling of the lower Court in *Robertson v. United States*, *supra*, we invite the attention of the Court to Section 10, paragraph E of the Administrative Procedure Act of 1946. 5 U. S. C. A., § 1011. 14 L. W. 49. This Court and the Court below, under the provisions of the Act, have the right and duty to "judicially review the action of any agency and it *may review the whole record* of the proceedings had below for the purpose of ascertaining any prejudicial error." The burden of proof was upon the proponent of the rule. (Sect. 7C of the Administrative Procedure Act).

Section 10 E of the Administrative Procedure Act was thus discussed by Mr. Justice Holtzoff in the District Court of the United States for the District of Columbia in *U. S. v. Watkins*, 73 Fed. Supp., 216 on page 219 with a rather full discussion of the history of the Act and of the authority.

"2. The vital provision of the foregoing section, for the purposes of this proceeding, is found in Clause (5), which empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. The statute contains no exception to this provision. Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent. In reviewing administrative findings, the court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence. The result is that in a habeas corpus proceeding to review a deportation or exclusion order of the immigration au-

thorities, it is not enough that there be some evidence to sustain the findings of fact. They must be supported by substantial evidence. If the court reaches the conclusion that there is no substantial evidence to sustain the findings, they must be set aside."

In view of the foregoing, it is respectfully submitted that the District Court erred in holding:

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents." 69 Fed. Supp. 788, 792 (R. 18).

Substantial evidence to support the action of the Commissioner of Patents was not the guide for the Court below. *Substantial probative evidence on the whole record* was the criterion.

We invoke all of these fountains of jurisdiction of this Court in that we submit:

1. That there was not even substantial testimony adduced to connect Dorsey with any of the charges either that recited in the rule or the others considered in the report of the Board on which the order of disbarment was issued;

2. That the punishment inflicted for whatever transgression may have been committed bore no relation whatever to penalties generally imposed in disbarment proceedings;

3. Dorsey was not given due process of law in that he was tried and convicted of charges not included in the rule to show cause issued against him.

**Dorsey Was Not a Party to Any Conspiracy.
Before the Patent Office Committee.**

For convenience, we here repeat the charges Dorsey, by the Rule to Show Cause, was called upon to answer (R. 9):

"You participated in the preparation of said (Clarke) article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by the said William P. Clarke and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on the said application."

The report of the Committee not only held Dorsey guilty as to the preparation of the Clarke article and the filing of it in the Patent Office in the manner charged but also guilty in misrepresenting to the Patent Office and to the Court of Appeals of the 3d Circuit the import of the said article and in connection with the payment of money to Clarke in 1932. We submit that the inclusion of these three additional matters in the findings against him is not only a violation of his rights but is indicative of the manner in which he was found guilty and the character of the report.

The provision for adequate notice is mandatory and a violation of it requires that the disbarment order be set aside. The Court in *Garfield v. United States*, 32 App. D. C. 153 said (pp. 158, 159):

"In this case the charge was limited to a particular act; namely, the purchase of warrants at an inadequate price; and was specifically denied. Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts. *United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 485, 493.

"In considering other charges than those which the relators were called upon to answer, and founding his

order of disbarment thereon, the Secretary acted in excess of his jurisdiction in the premises. Even if the charge made warranted the broad interpretation, still, the relators had denied the specific one, and their answers contained no admission of guilt in any other respect. Consequently a finding against them must necessarily have been founded on testimony taken without notice to them, and without opportunity to cross-examine the witnesses, and to the consideration of which they did not assent in any way."

It is submitted that the misrepresentation of the teachings of the Clarke article, even if proven, cannot by any stretch of language be embraced within the charge of false assertion of authorship. Such alleged malpractice is independent of authorship and could exist if Clarke is held to be the author; for it is independent of who wrote the article and is and must be based solely on what the article in fact says and on what Dorsey argued therefrom.

Nor is it apparent on what ground the Patent Office is called upon to consider misrepresentation to the Court of Appeals of the teaching of the Clarke article. That occurred, if at all, in 1932, years after the Peiler patent had issued and passed out of the control of the Patent Office.

Also in 1932 occurred the payment of money to Clarke. This certainly is not covered by the charges and while there was much testimony as to it before the Committee, nowhere in the course of the hearing was it intimated to Dorsey that he should consider himself charged therewith.

This anxiety of the Committee to bring into this case "shoring up devices" is in keeping with the proceedings.

The Rule to Show Cause was predicated on the opinion in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238 and *U. S. v. Hartford-Empire Co.*, 46 F. Supp. 541, and the record in the *Toledo* case. None of the respondents before the Patent Office raised any question but that the citations were sufficient to bring them before the Committee and all answered. The opinions should have then dropped from the case. They were not proof against the

Respondent; for the Respondent was not a party to the cases in which the proceedings were rendered. Nor should they be given any greater weight than is justified by the record before the courts in discussing Dorsey's connection with the matters. The whole proof as to Dorsey in the *U. S. A. v. Hartford-Empire Anti-Trust* case and in *Hazel-Atlas Glass Co. v. Hartford* case is found on pp. 155-158 of the record.

However, the prosecutor was not content with the reference to the opinion as found in the citations. He read lengthy extracts from the Findings of Fact in the District Court in the *Toledo* case, and from the opinion in the *Shaw-kee* case in the 3d Circuit Court of Appeals (R. 25-30). The Committee, following the prosecutor's lead, devoted pages of their report to extracts from the cases referred to.

These holdings were urged on the Committee by their counsel (or by the counsel of the Commissioner, which is the same thing) as *proof of guilt*. He states his position clearly; namely, that they created a *burden* on the respondents to come and show why they should not be disbarred (R. 16). That they did influence the Committee is shown by the fact that the same counsel contended before Judge Morris for the *presumptive* correctness of the matters quoted from the decisions.

Burden of Proof.

It is quite in keeping that starting with the theory that the burden of proof of innocence was on Dorsey, the Committee was led to convict Dorsey. How many of us are able to affirmatively prove, after twenty years, the falsity of charges that might be made against us? Section 7e (5 U. S. C. A., 1005) of the Administrative Procedure Act provides that the proponent of a rule shall have the burden of proof.

Apparently the Committee was led by the remarks of its counsel (Tr. 674) to believe that great laxity in regard to questions of proof exist in disbarment cases and entirely

fail to apply the rule laid down by the Court of Appeals, District of Columbia. We quote as follows from *in re Adriaans*, 28 D.C. 515; 524:

"The power to disbar ought always to be exercised with great caution and only in clear cases. No criminal proceedings on this account were commenced against this respondent, and after this long delay we cannot agree with the court that the matters disclosed by this record suffice to sustain this order. *This is not a criminal proceeding, but such a charge should be supported by a preponderance of satisfactory evidence.* The case should be clear and free from doubt. The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed about twelve years ago." (Italics supplied)

To the same effect is Judge Killets' holding that "But we cannot find respondent guilty of misconduct here on a preponderance of evidence alone; it should be clear and convincing (*in re Thatcher*, 190 Fed. 969-1002).

On the question of the degree of quantum of proof necessary to justify disbarment or suspension of an attorney, this Court's attention is respectfully invited to the annotation in 105 ALR 984, et seq. Our own Court of Appeals in the *Adriaan's* case, *supra*, emphasized that the evidence must be supported by a preponderance of the evidence and that "the case should be clear and free from doubt." Some courts require a "clear preponderance". Others require the proof to satisfy the Court to a reasonable certainty; others clear and convincing; and some few that it must be beyond a reasonable doubt. All of these authorities are contained in the above quoted annotation and will not be analyzed again.

Statute of Limitations.

While the law generally is that the statute of limitations does not apply to proceedings for disbarment of an attor-

ney, nevertheless the great length of time ensuing between the date of the alleged occurrence in 1926 and the institution of proceedings to disbar before the Patent Office in 1944 requires this Court to examine carefully the proof presented. The right to practice a profession is a privilege, but before the privilege is granted long years of preparation are required as well as an investment in time, industry, labor and the acquisition of skill. This right should not be revoked on evidence necessarily unreliable, uncertain and incomplete because of its antiquity.

The Court's attention is respectfully invited to the language of the Court below:

"It is indeed tragic that the severe penalty of disbarment should be visited upon these petitioners for acts of such distance in the past. It is for this Court, however, only to say in this connection whether or not such delay constitutes a bar to the prosecution of the disbarment proceedings, or has so impaired the rights of petitioners to a fair defense that they cannot now be held accountable for their past conduct. I must answer both questions in the negative. The conduct of the petitioners called into question by the disbarment proceedings was not, nor does it appear that by reasonable diligence it could have been, known to officials of the Patent Office prior to the time that information and evidence as to such conduct became available during the trial of the case of United States against Hartford and other glass companies. After such information became known in that case and until the Hazel-Atlas and Shawkee cases were decided by the Supreme Court, the Commissioner of Patents had reasonable justification for not starting proceedings against these petitioners, whose conduct, although they were not parties to such litigation was under consideration in said cases. No showing has been made that the delay has prejudiced the petitioners in their defense." (69 F. Supp. 788-803, Joint App. 47).

It is believed that the Court should take judicial notice that after eighteen years, evidence is lost and memory fails.

Indeed this case illustrates this. The letter of April 17, 1946 from Dorsey to Hatch was missing when Dorsey testified in this case, to be brought to light by a demand of the Government on Hartford. Presumably it had been in the knowledge of the Government for years.

The annotator in L. R. A. 1915 D at page 1218 quotes as follows:

"Thus, in *People ex rel. Colorado Bar Asso. v. Tanquary*, 48 Colo., 122, 109 Pac., 260, the court dismissed a proceeding for disbarment of an attorney where the offenses complained of were shown to have occurred eight and one-half years before any investigation thereof was made or prosecution begun, the court saying that that fact alone was, in their judgment, sufficient answer to the charges, and that it had ever been the policy of the court to discourage proceedings of that sort upon stale claims, and properly so, as a matter of common justice to the one charged, who otherwise might manifestly be placed at great disadvantage.

"In *People ex rel. Noyes v. Allison*, 68 Ill. 151, the court, in dismissing an information for a rule upon respondent to show cause why his name should not be stricken from the roll of attorneys, said: 'Nearly seven years have elapsed since the alleged misconduct. No explanation is given for the delay and the law will not favor the institution of prosecutions of this character after the lapse of such a great length of time. The charge is a serious one, and if respondent should be found guilty, the consequences would be most disastrous. The party whose rights are injuriously affected by conduct of the character alleged ought to be required to exhibit his information within a reasonable time, that the attorney implicated might be afforded an opportunity to make his defense while testimony for that purpose could be had. In analogy to our statutes which bar prosecutions for misdemeanors, there ought to be a limit as to the time in which informations could be filed.'"

Likewise, in 45 A. L. R. 1111, we find:

"The Statute of Limitations has no application to delinquencies such as have been shown to exist. The

court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, *by reason of such delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation*; but the proceeding for the disbarment of an attorney is not barred by the express terms of the Statute of Limitations, nor will the courts establish a limitation as to the time in which such proceedings may be instituted, by analogy to the Statute of Limitations, unless, from the nature of the circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences." *People ex rel. Healy v. Hooper* (1905), 218 Ill. 313, 75 N. E. 896. (Italics supplied.)

"It is contended that the proceeding was barred by some statute of limitations, but the accused points out no particular limitations applicable to cases of this character. Staleness in a charge against an attorney might prevent its being considered, *because an unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony which would have been available at an earlier time to meet such charge*; but the Statute of Limitations itself is no defense to such a proceeding." *Re Smith* (1906), 73 Kan. 743, 85 Pac. 584." (Italics supplied.)

It is submitted that two decades is too long a lapse between alleged occurrences and the institution of proceedings seeking to disbar.

Dorsey Was Not a Party to Any Conspiracy.

The petitioner apparently sensing that there is no proof of Dorsey's guilt *per se* seeks to load on him sins by a newly evolved theory of conspiracy not previously presented. In the absence of any other proof of conspiracy it sets up the Carter-Boshart letter as proving not only there was a conspiracy, but that it was therefore admissible as proof against Dorsey. We stress that the only contact proven to be had by Dorsey with the other alleged members of it was

a letter from Hatch in May and unproven conversations with Brown. Brown denies knowledge of any plan to use the Hatch-Clarke article in the Patent Office until after publication and knowledge of its contents. Dorsey had no contacts with Carter or Clarke.

The letter is not competent against Dorsey because—

(1) Carter has testified that the statements as to purpose contained therein were his own ideas and originated with him. It is not therefore even hearsay.

(2) Dorsey never saw the letter and had no contacts with its author about the Clarke article.

“ * * * The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of *other* defendants in his absence, and that a defendant cannot be bound by the acts or declarations of *other* defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established.” May v. U. S. U.S.C.A. 175 F. 2d 994 at 1007-8).

It is not necessary to conjure up a conspiracy to explain why Dorsey filed the Clarke article. He saw it as showing facts he wanted to bring to the attention of the Patent Office and not knowing its full history, filed it. When did the conspiracy originate and who was the contact man with Dorsey?

The Court Below Was Justified in Criticizing These Proceedings.

We have in the above refrained from referring to the findings of the lower Court that the proceedings in the Patent Office were grossly irregular and that the Patent Office has pursued Dorsey with improper vigor. For fear that this failure may be considered as approving the petitioner's contentions as to such findings we submit that:

(1) The Committee's proceedings clearly show that its members were intent on reaching a conclusion not only

following what this Court had found, but what stretch of construction they thought this Court meant irrespective of who suffered in livelihood or reputation.

(2) The proceedings for review indicate that the only substantial matter to be considered as to Dorsey is whether he filed the Clarke article with full knowledge of its history.

(3) The insistence of the petitioner, through its counsel in its attempt to fix guilt on Dorsey as to other and improper matters demonstrates the unseemingly vigor with which Dorsey has been prosecuted.

(4) The act of the petitioner in now bringing up the conspiracy theory shows that it has no substantial ground in the record to support the prosecution.

CONCLUSION.

We submit that all that the record shows approximating any misconduct on the part of Dorsey twenty-three years ago is that knowing that Hatch had persuaded Clarke to write an historical article framed to meet his, Clarke's, own views and to publish it over his name, he, Dorsey filed the published article in the Patent Office as the work of Clarke without calling on Hatch for a copy of any article submitted to Clarke by Hatch in order to make a comparison. We do not believe this was gross misconduct. At most it was negligence. The judgment below should be affirmed.

Respectfully submitted,

WILLIAM E. LEAHY

WILLIAM J. HUGHES, JR.

JAMES F. REILLY

821 Fifteenth Street, N. W.

Washington 5, D. C.

Attorneys for Appellant.